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Supreme Court of the United States

..... TERM, 1965.

No. 279

CHARLES H. BLANCHARD d/b/a BLANCHARD CONSTRUCTION COMPANY,
Petitioner,

versus

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	2
QUESTIONS PRESENTED	2
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	7
APPENDIX "A"	9
APPENDIX "B"	27
APPENDIX "C"	28
APPENDIX "D"	29
APPENDIX "E"	31
APPENDIX "F"	32

AUTHORITIES.

	Page
Cases:	
Blanchard v. St. Paul Fire and Marine Insurance Company, (5th Cir., 1965), 341 Fed 2d 351	6
Michigan Surety Company v. Service Machinery Corp., (5th Cir. 1960) 277 F2d	6
U. S. vs. Bianchi & Co., 373 U.S. 709	5
U. S. vs. Holpuch, 328 U.S. 234	5
Miscellaneous:	
Title 41 U. S. Code Sects. 321 and 322	2
28 U. S. Code Sec. 1254 (1)	2
Federal Rule of Civil Procedure 60 (b)(4), (5) and (6)	1, 2, 4, 5, 6

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Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals, Fifth Circuit, affirming the action of the lower court denying petitioner relief under Federal Rule of Civil Procedure 60(b).

Opinions Below.

There was no formal opinion of the District Court. The opinion of the Court of Appeals for the Fifth Circuit (App. A, *infra* pp. 9-26) is reported at 341 F2d 351.

JURISDICTION.

Order of the District Court was entered on October 14th, 1963. Timely appeal was perfected to the United States Court of Appeals for the Fifth Circuit, which affirmed the District Court on February 9th, 1965. (Appendix F, p. 32.) A timely petition for rehearing was filed by petitioner and it was overruled on March 12th, 1965 (Appendix B, p. 27). The jurisdiction of this Court is invoked under 28 U. S. Code Sec. 1254 (1). The federal question was raised in the District Court by petitioner's motion for relief under Rule 60B(4) (5) and (6).

STATUTES INVOLVED.

The following statutory provisions are set forth in the Appendix E, p. 31: Title 41 U. S. Code, Sections 321 and 322. The following federal rule of civil procedure is set forth in Appendix D, p. 29; Rule 60 (b).

STATEMENT.

When petitioner's contract with the government was terminated for default in performance (R. 109-110) he was a solvent contractor and had twenty-two days remaining to complete the contract (R. p. 76). Under the disputes clause of his contract he appealed to the Armed Services Board of Contract Appeals (ASBCA), which on August 29, 1962 sustained each of his appeals and found that the ". . . . . termination of appellant's right to proceed was improper" (R. p. 97).

On September 28, 1962, the government through its representative notified petitioner that the government's notice of default termination ". . . . . dated 18 July 1962 is deemed to have been issued pursuant to clause 23 entitled 'Termination for Convenience of the Government,' effective 25 July 1961, the date you received said notice of default termination." (R. p. 113, 114.)

On August 22, 1962, judgment was entered in District Court in the amount of $79,840.84 for respondent against petitioner, representing costs allegedly incurred by respondent as the result of completing the contract between petitioner and the government. (The bond is found p. 15 of the record.)

Respondent undertook to complete petitioner's contract by a supplemental agreement dated July 27, 1961. (R. p. 120.) Under the terms of that agreement respondent was to perform or to procure the performance ". . . . of all work called for under said contract not presently completed", *supra*.

The judgment from which relief is sought was based on claim by respondent against petitioner, demanding indemnity ". . . for loss sustained because of plaintiff's (petitioner's) default". (R. p. 8.)

QUESTIONS PRESENTED.

Petitioner, under contract with the United States to renovate buildings was placed in default of his contract even though he was solvent and had been granted time

to complete the work. His bonding company completed the job, and under its contract of indemnity with petitioner obtained a judgment against petitioner based upon his alleged default. Prior to entry of that judgment petitioner appealed the termination of his contract and other disputes to the Armed Services Board of Contract of Appeals, (ASBCA) and was sustained in all of his appeals. The government converted the termination of his contract for default in performance *nunc pro nunc* to convenience of the government. He was sustained by the ASBCA seven days after judgment was entered against him for his bonding company. The conversion of the default took place thirty-seven (37) days after entry of judgment. Timely motion under FRCP 60(b) was filed asking relief from the judgment, from which facts the following questions are presented:

(1) Whether the cause of action of the bonding company under its indemnity contract with petitioner was subject to the right of petitioner to appeal his wrongful termination to the ASBCA?

(2) Whether the bonding company was a volunteer of its services to the government, when it knew that the termination of petitioner's contract was not a final judgment, but was subject to appeal?

(3) Whether the discretion allowed Federal Courts under FRCP 60(b) to relieve a defendant of the effects of a judgment is sufficiently broad to permit the court to vacate a judgment based upon facts which have changed within seven days after entry of the judgment?

(4) Whether the refusal of the trial court to answer (3) above in the affirmative is an abuse of discretion?

(5) Whether the decision of the ASBCA sustaining petitioner's appeal from the decision of the contracting officer placing him in default is a *quasi* judicial decision binding upon the United States on one hand and the petitioner and his bondsman on the other?

Reasons for Granting the Writ.

When petitioner's contract with the government was terminated, his sole remedy was an appeal to the Armed Services Board of Contract Appeals (ASBCA).[1] Having written the performance bond for petitioner, the respondent's liabilities were measured by the same contract which gave the petitioner the right of appeal. When petitioner's contract was terminated, respondent had two choices: (a) It could refuse to complete the contract, awaiting the outcome of petitioner's appeals, or (b) complete the contract, at the risk of petitioner prevailing in the ASBCA. It chose the latter, and notwithstanding the fact that petitioner is not in default, respondent desires to collect on a judgment which was premised on the termination of the contract for default in performance.

Respondent, the lower court and the Fifth Circuit fail to see more in the ASBCA decision than an adjustment of a dispute between the petitioner and the government. And herein we believe lie the seeds of a grave injustice, as well as a misconception of the law. For the Wunderlich Acts as interpreted by this court provide remedies for *quasi* judicial determination of disputes between the government and its contractors. Respondent has all along

[1] 41 USC Sects. 321 & 322; *U.S. vs. Bianchi & Co.*, 373 U. S. 709; *U. S. vs. Holpuch*, 328 U. S. 234.

contended that its hands were tied when the contracting officer terminated petitioner, and called upon the bonding company to complete the contract. In so doing it accords to the decision of the contracting officer a sense of finality which a reading of the Wunderlich Acts and the cases deciding it would be promptly correct. It treats the decision of the contracting officer as final, and the decision of the ASBCA reversing the contracting officer as having no meaning. But the orderly administration of disputes between the government and contractors demands a respect of the right of the contract to appeal his disputes. The right of petitioner to appeal was of the same moment as if a resolution of the dispute had been a decision adverse to the contractor in a court of law. Until the time for appeal expired, the decision would not have been final, and once an appeal had been taken the actions of the bonding company would have to be measured against the possibility that its principal might prevail in its appeals. Bonding companies are in business to take such risks.

The decisions of the lower court and the court of appeals refusing relief to petitioner do not accord to Rule 60(b) FRCP the liberal interpretation to which lip service has been given by the Fifth Circuit and other courts, and once it is conceded that the disputes clause of the contract read with the Wunderlich Acts provide a *quasi* judicial procedure for the determination of disputes, it is impossible to agree with Judge Morgan[2] that the facts in the case of *Michigan Surety Company v. Service Machinery Corp.*, (5 Cir. 1960) 277 F2d are "inopposite".

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[2] Sitting by designation with Judges Rives and Wisdom in *Blanchard v. St. Paul Fire and Marine Insurance Company*, (5th Cir., 1965), 341 Fed 2d 351.

Judge Morgan and the court concluded that "The favorable administrative decision which Blanchard later obtained against the United States for the wrongful termination of his contract should not entitle Blanchard to relief under Rule 60(b)." Petitioner urges the court that it is precisely because of the favorable administrative ruling that he should be given relief. He was confined by law to the administrative procedure of appeal. Had he prevailed before respondent obtained a judgment against him, there is little doubt that the favorable administrative decision would have been a bar to the respondent's action for indemnity.

Neither the District Court nor the Fifth Circuit has come to grips with the real; meaningful question, which stated rhetorically is: How can a judgment premised on the default of petitioner in the performance of his contract be permitted to stand, when it is later determined that he was not in default?

CONCLUSION.

It is respectfully submitted that the writ should be granted in order to permit this court to clarify the legal effect of the final order of the ASBCA overruling the contracting officer, to give meaning to the equitable relief implicit in Rule 60(b) and to do justice to petitioner.

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